Supreme Court, U.S.
FILED

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NO.

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1996

RICHARD HEBERLIG
Petitioner,

vs.

RAYMOND SOBINA
AND
ERNEST D. PREATE, JR.
ATTORNEY GENERAL OF THE
STATE OF PENNSYLVANIA
Respondents.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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38 pp

QUESTIONS PRESENTED

I. Was petitioner's guilty plea improperly induced, thus denying Mr. Heberlig his right to Due Process under the Fifth and Fourteenth Amendments to the United States Constitution, where the trial judge participated in plea negotiations, thus coercing petitioner's guilty plea?

II. Was petitioner's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution abridged where petitioner's guilty plea resulted from counsel's incorrectly informing petitioner that he would be eligible for parole in 14 years, when there is no parole in Pennsylvania from sentences of life imprisonment, and petitioner relied on that erroneous advice in pleading guilty?

III. Was petitioner denied his Sixth and Fourteenth Amendment rights to the effective assistance of counsel where his trial counsel failed to raise petitioner's assertion of his right to an attorney prior to giving a statement, all in violation of petitioner's Fifth and Sixth Amendment rights against self-incrimination and to the assistance of effective counsel?

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1. Petitioner's guilty plea was improperly induced, thus denying Mr. Heberlig his right to Due Process under the Fifth and Fourteenth Amendments to the United States Constitution, where the trial judge participated in plea negotiations, thus coercing petitioner's guilty plea.

2. Petitioner's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution was abridged where

petitioner's guilty plea resulted from counsel's incorrectly informing petitioner that he would be eligible for parole in 14 years, when there is no parole in Pennsylvania from sentences of life imprisonment, and petitioner relied on that erroneous advice in pleading guilty.

3. Petitioner was denied his Sixth and Fourteenth Amendment rights to the effective assistance of counsel where his trial counsel failed to raise petitioner's assertion of his right to an attorney prior to giving a statement, all in violation of petitioner's Fifth and Sixth Amendment rights against self-incrimination and to the assistance of effective counsel.

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Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Richard Heberlig, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The Order of the Third Circuit Court of Appeals affirming the judgment of the District Court, is reproduced as Appendix A to this petition. The Memorandum decision of the United States District Court (Smith, J.) is attached as Appendix B.

JURISDICTION

The Order of the United States Court of Appeals for the Third Circuit affirming the judgment of the District Court was filed on April 30, 1997. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1) (1982).

The jurisdiction of the court below rested upon 28 U.S.C. §2253(c)(1) and was timely invoked by a request for certificate of appealability filed within thirty (30) days of the District Court's denial of petitioner's petition for writ of habeas corpus. The District Court's jurisdiction was properly invoked under 28 U.S.C.§2254.

STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V to the United States Constitution provides, in pertinent part, that

"No person shall be... compelled in any criminal case to be a witness against himself. . . nor be deprived of life, liberty, or property, without due process of law..."

Amendment VI to the United States Constitution provides, in pertinent part, that "In all criminal prosecutions, the accused shall. . .have the assistance of counsel for his defense."

Amendment XIV to the United States Constitution provides, in pertinent part, that "No state shall. . . deprive any person of. . . liberty. . . without due process of law. . . ."

STATEMENT OF THE CASE

This appeal arises from the imposition of a sentence of life imprisonment imposed on a charge of first degree murder. That charge stemmed from the shooting death of one Barbara Jean Frey occurring on November 9, 1979, in Lancaster County, Pennsylvania.

A. Procedural History

Petitioner, Richard Heberlig was arrested on December 15, 1979 and charged with murder and related charges. He was represented pre-trial and during trial proceedings by Mario D'Alphonso ("Trial/Post-Verdict Counsel"). Petitioner pled guilty on May 6, 1980 to the charge of murder generally. The trial court, the Honorable D. Richard Eckman, determined on May 8, 1980 that the degree of guilt was murder in the first degree. The judge determined that Mr. Heberlig be sentenced to life imprisonment.

Post-verdict motions were denied on February 23, 1981 and a notice of appeal was timely filed. Trial/Post-Verdict Counsel, Mr. D'Alphonso, withdrew and attorney Neil Albert, Esquire (PCHA/Appellate Counsel) was appointed to represent petitioner on appeal.

Petitioner, through his court-appointed counsel, filed a petition under Pennsylvania's Post Conviction Hearing Act, 42 P.S.A. §§ 9541 et seq. (PCRA), on or about November 30, 1981, alleging that Mr. D'Alphonso was ineffective for failing to familiarize himself with the Lancaster County jury selection "customs", and in failing to effectively prepare to litigate a change of venue motion. The sole issue raised in petitioner's direct appeal from the judgment of sentence of life imprisonment was the issue of sufficiency of evidence.

On November 18, 1981, the Superior Court remanded the case to the lower court to allow an evidentiary hearing on the PCHA petition. On February 2, 1982, a hearing was held on the PCHA petition regarding prior counsel's ineffective assistance in not familiarizing himself with Lancaster County customs, and in failing to properly prepare for and litigate the change of venue motion. On May 21, 1982, Judge Eckman denied the PCHA petition. A timely appeal was taken from that denial.

On July 23, 1982, the direct appeal and the PCHA appeal were consolidated, by order of the Superior Court. On August 5, 1983, the Superior Court denied petitioner's consolidated appeal. On November 16, 1983, the Supreme Court of Pennsylvania denied petitioner's petition for allowance of appeal.

On October 3, 1991, petitioner filed a motion for relief under Pennsylvania's present Post-Conviction Relief Act, raising the same issues presented to this court, and requesting an evidentiary hearing on the contested facts. The trial court, Judge Eckman, denied petitioner's PCRA petition, without a hearing, on April 24, 1992. Petitioner filed a timely notice of appeal to the Pennsylvania Superior Court which on January 19, 1993 affirmed the lower court's summary denial of his petition in a 2-1 decision. The dissenting Judge would have granted an evidentiary hearing to Mr. Heberlig on his claims. Petitioner filed a timely petition for allowance of appeal to the Pennsylvania Supreme Court, which denied that petition on February 22, 1994.

On or about December 2, 1994, petitioner filed a petition for habeas corpus under 28 U.S.C. §2254 in the United States District Court for the Western District of Pennsylvania. On May 16, 1996, the Honorable D. Brooks Smith dismissed petitioner's habeas corpus petition, without a hearing, in a memorandum order. Petitioner filed a timely notice of appeal, and a timely request for a certificate of appealability. His request was denied on April 30, 1997.

B. Statement of Facts

Petitioner was arrested on December 15, 1979, and charged with the shooting death of Barbara Jean Fry.

At the time of his arrest in 1979, Mr. Heberlig was twenty-three years old, serving in the United States Coast Guard stationed in Hawaii, and had no prior experience with the criminal justice system. At the time of his arrest, petitioner requested counsel before making a statement. Nevertheless, all counsel prior to present counsel failed to raise this issue prior to trial, during trial, and through all direct appeals.

During jury selection, the trial judge, the prosecutor, and counsel for Mr. Heberlig discussed his case in a chambers conference. At that point in time, the trial judge made known his views on petitioner's possible degree of guilt, as well as the appropriateness of the death penalty. Those views were transmitted to petitioner. Further, petitioner's trial counsel erroneously informed petitioner that a life sentence in Pennsylvania meant he would serve approximately 14 years. Trial counsel was wrong. In fact, prisoners sentenced to life in Pennsylvania serve their natural life in prison.

Based on this erroneous advice, Mr. Heberlig then pled guilty to murder generally, on May 6, 1980. After a hearing to fix the degree of guilt, the trial court adjudged petitioner guilty of murder in the first degree, and fixed the sentence at life imprisonment.

Petitioner first raised his claims regarding the trial court's improper involvement in plea bargaining, the erroneous and misleading advice regarding parole his trial counsel had given him, and the above-mentioned violation of *Miranda v. Arizona*, 384 U.S. 436 (1966) when petitioner filed a motion for relief under Pennsylvania's present Post Conviction Relief Act. After the submission of memoranda of law, the same trial judge who sentenced petitioner, and who is the subject of petitioner's allegations regarding improper judicial involvement and plea bargaining, denied his petitioner without a hearing on April 24, 1992. The dismissal of the petitioner's PCRA, was affirmed by the Pennsylvania Superior and Supreme Courts. Petitioner filed the present application for habeas corpus under 21 U.S.C.§2254.

C. Reasons for Granting the Writ

1. Petitioner's guilty plea was improperly induced, thus denying Mr.

Heberlig his right to Due Process under the Fifth and Fourteenth Amendments to the United States Constitution, where the trial judge participated in plea negotiations, thus coercing petitioner's guilty plea.

2. Petitioner's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution was abridged where petitioner's guilty plea resulted from counsel's incorrectly informing petitioner that he would be eligible for parole in 14 years, when there is no parole in Pennsylvania from sentences of life imprisonment, and petitioner relied on that erroneous advice in pleading guilty.

3. Petitioner was denied his Sixth and Fourteenth Amendment rights to the effective assistance of counsel where his trial counsel failed to raise petitioner's assertion of his right to an attorney prior to giving a statement, all in violation of petitioner's Fifth and Sixth Amendment rights against self-incrimination and to the assistance

of effective counsel.

1. The Trial Court's Participation In Plea Discussions, Made Known to Mr. Heberlig, Invalidated His Guilty Plea.

Petitioner pled guilty because he was told by his lawyer that the trial judge, the Honorable D. Richard Eckman, had participated in the plea discussions and had made known to counsel the judge's possible position on guilt and penalty. Petitioner's trial attorney, Mario D'Alphonso, Esquire, communicated to petitioner that the trial judge was not inclined to impose the death penalty, and that the judge had given Mr. D'Alphonso further indications that he felt that the degree of guilt might very well rise no higher than third degree murder.

Petitioner was, at the time he entered his plea, coerced by the trial court's participation in the plea discussions, as well as by the indications the trial judge had given regarding both the penalty and degree of guilt. Petitioner felt at the time, and would presently testify if afforded an evidentiary hearing, that based on the trial judge's expression of opinion, he could not decline to plead guilty to murder generally, rather than go to trial.

In both his PCRA petition and his federal habeas corpus petition, petitioner averred that he pled guilty as a result of that coercion, and sought an evidentiary hearing at which he could so testify. Nevertheless, the trial court, Judge Eckman, denied his petition summarily. The United States District Court also denied his petition without a hearing. Consequently, he has not, as of yet, had an opportunity to prove his claim in a court of law.

Petitioner did not simply rely, in his petitions, on his own assertion that the trial court had participated in such plea discussions, and that those plea discussions had been communicated to him by his trial attorney. He also relied, in his petitions, on the testimony that Mr. D'Alphonso, his trial attorney, gave under oath in federal court before the Honorable John Fullam, in November of 1990 in *Roderick Frey v. Thomas Fulcomer*, (U.S.D.C., Ed. Pa. C.A. 89-4248). In *Frey v. Fulcomer*, *supra*, Mr. D'Alphonso testified that Judge Eckman participated in the plea discussions. See also *Frey v. Fulcomer*, 974 F.2d 348 (3rd Cir. 1992).

Mr. D'Alphonso's testimony, which was given under oath, supports petitioner's claim regarding judicial involvement in the plea discussions which fatally tainted his guilty

plea. Petitioner was denied his due process rights under both the Pennsylvania and United States Constitutions when the trial judge participated in the plea discussions, gave an indication as to his leanings on the degree of guilt and penalty, and those thoughts were communicated to petitioner by his then trial counsel. That communication both tainted trial counsel's stewardship of petitioner's case, and vitiated petitioner's exercise of his free will in deciding whether or not to plead guilty.

Pennsylvania Rule of Criminal Procedure 319(b)(1) specifically provides "The Trial Judge shall not participate in the plea negotiations preceding an agreement." See *Commonwealth v. Alvarado*, 442 Pa. 516, 276 A.2d 526 (1971); *Blackledge v. Allison*, 431 U.S. at 75-76 (habeas claims supported by petitioner's "specific factual allegations" that he was induced to plead guilty by his attorney's representations that he had obtained a commitment from the prosecutor and the judge for a more lenient sentence than the one actually imposed). Compare Federal Rule of Criminal Procedure 11(e)(1), Notes of Advisory Committee, citing ABA Standards Relating to Guilty Plea §3.3(a) (Approved Draft, 1968). In those notes, the Advisory Committee indicated: -

> "There are valid reasons for a judge to avoid involvement in plea discussions. It might lead the defendant to believe that he would not receive a fair trial, were there a trial before the same judge. The risk of not going along with the disposition apparently desired by the judge might induce the defendant to plead guilty, even if innocent. Such involvement makes it difficult for a judge to objectively assess the voluntariness of the plea."

Clearly, petitioner's claims, if proved, would entitle him to withdraw his plea. Those claims were not waived, since both prior counsel were ineffective for not raising them. Ineffective assistance of counsel provides cause under the "cause and prejudice" standard for excusing procedural default, if any. The prejudice to petitioner, who involuntarily pled guilty, is evident. Petitioner should have been granted a hearing on his claims, and should be allowed to withdraw his guilty plea.

For that reason, this court should grant petitioner's petition for writ of certiorari, and permit petitioner to withdraw his plea of guilty.

2. Trial Counsel Improperly Induced Mr. Heberlig's Guilty Plea By Misinforming Him That A Life Sentence Meant Parole Eligibility In Fourteen Years.

Petitioner averred in both his PCRA and habeas corpus petitions, and is presently prepared to testify, that his trial counsel, Mr. D'Alphonso, who is licensed in New Jersey but not in Pennsylvania, informed him prior to his pleading guilty that a life sentence in Pennsylvania meant he would be eligible for parole in fourteen years. In fact, Pennsylvania is one of only three states in which there is no parole from a life sentence. See *Simmons v. South Carolina*, 114 S.Ct. 2187 (1994), footnote 8. In other words, a life sentence means incarceration for the natural life of the individual sentenced.

Petitioner would further testify that he relied on that advice in pleading guilty, and absent that erroneous information he would not have pleaded guilty.

Clearly, if petitioner pled guilty under the mistaken assumption, caused by misinformation provided to him by his trial counsel, that he would be eligible for parole in fourteen years, when in fact he will never be eligible for parole, such misinformation about the most vital aspect of his sentence

invalidated his plea of guilty.

In a case strikingly similar to the instant one, *U.S. v. Marzgliano*, 588 F.2d 395 (3rd Cir. 1978), the Third Circuit held that a defendant who produced his testimony, that of a co-defendant, and that of an attorney showing misrepresentations by defense counsel regarding sentencing, was entitled to a hearing to prove that his guilty plea was not voluntary because of such representations. The defendant's prior statements at his voluntariness (guilty plea) hearing to the effect that neither his attorney nor the government had made any promises to him inducing him to plead guilty did not bar him from subsequently asserting that his guilty plea was not voluntary because of the above misrepresentations, particularly since the trial judge allegedly involved in the improprieties was the judge before whom the voluntariness hearing took place. See also *Lesko v. Lehman*, 925 F.2d 1527 at 1538 (3rd Cir., 1991) (citing cases).

See also *Sparks v. Sanders*, 852 F.2d 882 (6th Cir., 1988) (defendant pled guilty because of misadvice by attorney that, if he went to trial and lost, any life sentence would be without any possibility of parole. Kentucky does allow parole on a life sentence); *Hill v. Lockhart*, 894 F.2d 1009

(8th Cir., 1990, en banc) (erroneous information from defendant's attorney regarding parole eligibility constituted ineffective assistance of counsel); *Holmes v. U.S.*, 876 F.2nd 1545 (11th Cir. 1989) (same). See *Hawkins v. Murray*, 798 F.Supp. 330 (E.D. VA. 1992) (accord). Compare *Warner v. U.S.*, 975 F.2d 1207 (6th Cir. 1992).

Petitioner's due process rights under the United States Constitution were violated by this misinformation. Furthermore, he was denied his Sixth Amendment right to the effective assistance of counsel when his lawyer so woefully misinformed him regarding the consequences of his plea. He was further denied the effective assistance of counsel when prior appellate counsel failed to raise this issue.

The trial court inexplicably denied petitioner a hearing on his proffer regarding this allegation, notwithstanding the fact that proof of this allegation would entitle petitioner to withdraw his plea and to be afforded the opportunity to go to trial. See *U.S. v. Marzgliano*, *supra*; *Lesko v. Lehman*, *supra*. Further, the district court erred in denying petitioner's habeas corpus petition without a hearing. As noted above, ineffective assistance of counsel provides cause under the "cause and prejudice" standard

for excusing procedural default, if any. The prejudice to petitioner, who involuntarily pled guilty, is evident.

For that reason, this court should grant petitioner's petition for writ of certiorari, and permit petitioner to withdraw his plea of guilty.

3. Prior Counsel Was Ineffective For Failing to Raise The Denial Of Mr. Heberlig's Right To Counsel At The Time He Made His Statement.

Petitioner will testify that he informed all prior counsel that, at the time of his arrest, he made a request for counsel, but that request was ignored. He then made an inculpatory statement. Petitioner has relied on all prior counsel to raise this issue, but all prior counsel have failed to do so, without just cause.

Clearly, if petitioner asked for counsel at the time of his arrest, but that request was ignored, any statement he made would have had to have been suppressed. See *Edwards v. Arizona*, 451 U.S. 477 (1981).

Petitioner is entitled to an evidentiary hearing on this claim. Nevertheless, the state lower court and district court refused

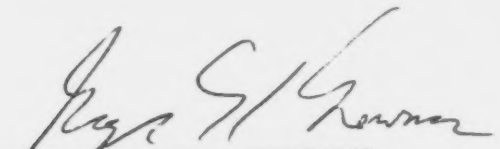
to grant him one. This was palpable error, and a hearing must be granted on this issue, as well as the two preceding issues. Cause and prejudice are present, and excuse any procedural default.

For that reason, this court should grant petitioner's petition for writ of certiorari, and permit petitioner to withdraw his plea of guilty.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, petitioner prays that this Honorable Court grant his petition for writ of certiorari to review the order of the United States Court of Appeals for the Third Circuit.

Respectfully Submitted,



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APPENDIX A - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING MR. HEBERLIG'S APPLICATION FOR CERTIFICATE OF APPEALABILITY.

BPS-169 March 27, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. No. 96-3318

RICHARD HEBERLIG

vs.

RAYMOND SOBINA, ET AL.

(W.D. Pa. Civ. No. 94-CV-00269J)

Present: SL0VITER, CHIEF JUDGE, STAPLETON and COWEN, CIRCUIT JUDGES

Submitted are:

(1) Appellant's application for certificate of probable cause, which may be construed as Appellant's request for a certificate of appealability pursuant to 28 U.S.C. §2253(c)(1): and

(2) Appellant's memorandum of law in support thereof in the above-captioned case.

Respectfully,

s/ P. Douglas Sink
Clerk

PDS/TJS/ms

----------ORDER----------

The foregoing request for a certificate of appealability is denied. See Coleman v. Thompson, 501 U.S. 722, 752-54 (1990); Murray v. Carrier, 477 U.s. 478, 488 (1986).

By the Court,

s/_____
Circuit Judge

Dated: April 30, 1997

APPENDIX B - MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT DATED MAY 16, 1996.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RICHARD HEBERLIG, Petitioner	:	
vs.	:	Civil Action No.
RAYMOND SOBINA, Warden, S.C.I. Rockview, Respondent	:	94-269J

MEMORANDUM ORDER

SMITH, District Judge

This matter was referred to Magistrate Judge Keith A. Pesto for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C.§636(b)(1), and subsections 3 and 4 of Local Rule 72.1 for Magistrate Judges.

The Magistrate Judge filed a Report and Recommendation on February 6, 1996, docket no. 14, recommending that the petition for writ of habeas corpus be denied. The parties were notified that pursuant to 28 U.S.C.§636(b)(1), they had ten days to serve and file written objections to the Report and Recommendation

Appendix B

Petitioner submitted objections on February 16, 1996, docket no. 15, which I have considered.

After de novo review of the record of this matter, together with the Report and Recommendation and the objections thereto, the following order is entered:

AND NOW, this 16th day of May, 1996, it is ORDERED that the petitioner's petition for a writ of habeas corpus is denied. A certificate of probable cause is denied. The Report and Recommendation is adopted as the opinion of the Court. The Clerk shall mark this matter closed.

By the Court,

s/ D. Brooks Smith
D. Brooks Smith
United States District Judge

cc: George H. Newman, Esq.
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Susan E. Slusser, Esq.
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APPENDIX C - ORDER OF THE PENNSYLVANIA SUPREME COURT DENYING MR. HEBERLIG'S PETITION FOR ALLOWANCE OF APPEAL.

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PA, Respondent:	:	No.253 Eastern District Allocatur Docket 1993
v.	:	Petition for Allowance
	:	of Appeal from the Order
RICHARD HEBERLIG, Petitioner:	:	of Superior Court

O R D E R

PER CURIAM:

AND NOW, this 18th day of February, 1994, the Petition for Allowance of Appeal is DENIED.

Mr. Justice Castille did not participate in the consideration or decision of this matter.

Mr. Justice Frank J. Montemuro is sitting by designation as Senior Justice pursuant to Judicial Assignment Docket No. 94 R1800, due

Appendix C

to the unavailability of Mr. Justice Rolf Larsen, see No. 127 Judicial Administration Docket No. 1, filed October 28, 1993.

TRUE COPY FROM RECORD
Attest: February 22, 1994

s/ Patricia Johnson
Patricia Johnson
Chief Clerk
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

APPENDIX D - JUDGEMENT ORDER, MAJORITY MEMORANDUM OPINION, AND DISSENTING STATEMENT IN THE PENNSYLVANIA SUPERIOR COURT.

COMMONWEALTH OF PA,	:	IN THE SUPERIOR COURT
	:	OF PENNSYLVANIA
v.		
	:	No. 1789
RICHARD HEBERLIG,	:	Philadelphia 1992
Appellant	:	

Appeal From the Post Conviction Relief Act April 24, 1992 in the Court of Common Pleas, Criminal Division, Lancaster County, No. 170-1980

J U D G M E N T

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Lancaster County be, and the same is hereby AFFIRMED.

By the Court,

s/ David A. Szewczak
PROTHONOTARY

Dated: January 19, 1993

Appendix D

COMMONWEALTH OF PA, : IN THE SUPERIOR COURT
: OF PENNSYLVANIA
v.
: No. 1789
RICHARD HEBERLIG, : Philadelphia 1992
Appellant :

Appeal From the Post Conviction Relief Act April 24, 1992 in the Court of Common Pleas, Criminal Division, Lancaster County, No. 170-1980
BEFORE: CAVANAUGH, POPOVICH and CERCONE, JJ.

FILED: JANUARY 19, 1993

MEMORANDUM:

This is an appeal from the order of the Court of Common Pleas of Lancaster County, dated April 24, 1992, which denied appellant's petition for post-conviction relief pursuant to the Post-Conviction Relief Act, 42 Pa.C.S.A. §§9541-9546. We affirm.

The pertinent facts of this matter have been aptly set forth in the trial court's opinion to this court and we need not repeat them here. Appellant raises one issue for our review: whether the trial court erred in denying appellant's petition for post-

conviction relief without having held a hearing on the allegations in the petition. When reviewing the grant or denial of a petition for post-conviction relief we are limited to determining whether the lower court's findings are supported by the record and its order is otherwise free of legal error. Commonwealth v. Laskaris, 407 Pa. Super. 440, 444, 595 A.2d 1229, 1230 (1991). We also note that the trial judge may dispose of a post-conviction relief petition without a hearing if the judge is satisfied that there are no genuine issues of material fact and that the defendant is not entitled to relief. Pa.R.Crim.P. Rule 1507(a), 42 Pa. C.S.A.

Underlying appellant's petition is the allegation that all of appellant's prior counsel were ineffective for failing to complain of the trial judge's improper involvement in plea negotiations which, in turn, caused appellant's guilty plea to be unlawfully induced. To support this contention, appellant refers us to the transcript of the federal habeas corpus hearing of appellant's co-defendant where appellant's counsel, Mario Joseph D'Alphonso, stated that the trial judge commented on the

case.[1] Appellant avers that "he felt coerced

---

[1] Appellant quotes the pertinent testimony of attorney D'Alphonso as follows:

> "At some point in time Judge Eckman became involved. I don't know whether we asked him to sit in or he asked us, but whatever it was there were several conversations with him, especially when the jury - we had a string of jurors come in that morning session, all of whom basically said since my client was there he must be guilty and they had no problem with that concept and no problem with the death penalty.
>
> "At that point I think we all began to realize there might be a substantial problem. We had submitted some one hundred and fifty something voir dire questions. I was fully prepared to ask each prospective juror each question just to try to eliminate everyone. And I continued to press the issue of change of venue because I felt that these jurors had been so inundated by this case there

was nothing we could get with a jury other than a death penalty."

Finally, in the course of discussion I got the real fee [sic] that Judge Eckman was not impressed by the Commonwealth's theory of aggravating circumstances and I got the real feeling if we decided to plead go [sic] murder generally that he would not institute the death penalty.

Question by Mr. Louis Natali: Tell us what the Judge said, if you can recall?

Answer: Somebody mentioned to me, it may have been you, it may have been our discussions because I remember vividly a lot of discussions with Mr. Sorrentino and everyone else during this trial because they allowed me to use their offices, etc. There was conversation along the lines of not looking for blood or not wanting anybody's head or something to that effect.

Question: This is from the Judge?

Answer: Again I talked to you about this last week, I am not sure but it came up in that conversation. Whether it was

by the trial court's participation in the plea discussion . . . such that [he] did not feel he could decline to plead guilty to murder generally, rather than go to trial with the jury he was selecting." Appellant's Petition for Post-Conviction Relief, paragraph 13.

We have reviewed the parties' briefs and the certified record in this matter and find that the opinion of the Honorable D. Richard Eckman adequately addresses appellant's claim. We therefore affirm on the basis of that

---

> actually Judge Eckman saying that or me saying this is not the kind of case that calls for blood and him agreeing. He seemed to let Mr. "Madenbacher" [sic] and myself feel, especially Joe, that he was not particularly sure that the aggravating circumstance outweighed the mitigating in this young fellow's case. . ."

Appellant's brief at 9-10.

opinion and adopt it as our own. We note further, however, that appellant's contentions of coercion by the trial judge are belied by the record. The testimony of Attorney D'Alphonso is vague as to the court's involvement in any negotiations and certainly does not indicate any improper conduct. Moreover, at the guilty plea colloquy, Judge Eckman conducted a thorough hearing into the voluntariness of appellant's plea. Judge Eckman specifically asked appellant whether anyone threatened, coerced or forced him to plead guilty. Appellant responded, "No." N.T. 5/6/80 at 51. Had appellant felt coerced by the trial judge's actions, it was incumbent upon him to inform the judge at that time. We therefore find that the trial judge did not abuse his discretion in denying appellant's petition without a hearing.

Order affirmed.

CAVANAUGH, J., files a Dissenting Statement.

Appendix D

COMMONWEALTH OF PA, : IN THE SUPERIOR COURT
: OF PENNSYLVANIA
v.
: No. 1789
RICHARD HEBERLIG, : Philadelphia 1992
Appellant :

Appeal From the Post Conviction Relief Act April 24, 1992 in the Court of Common Pleas, Criminal Division, Lancaster County, No. 170-1980

FILED: January 19, 1993

BEFORE: CAVANAUGH, POPOVICH and CERCONE,JJ.

DISSENTING STATEMENT BY CAVANAUGH, J.:

Since I would conclude that the trial court erred in not conducting an evidentiary hearing on appellant's P.C.R.A. petition, I respectfully dissent and would remand for that purpose. See Commonwealth v. Ford, 335 Pa. Super. 398, 403-403, 484 A.2d 406, 408-9 (1984).